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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 578

TRUST COMPANY OF GEORGIA, AS SUCCESSOR TRUSTEE UNDER DEED OF JULIAN E. HOWELL, PETITIONER

v.

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, discussion and conclusions of law of the District Court (R. 85–99) are not reported. The opinion of the Circuit Court of Appeals (R. 108–115) is reported at 164 F. 2d 438.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 21, 1947. (R. 116.) The petition for a writ of certiorari was filed Feb-

ruary 6, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in holding that for estate tax purposes Section 302 (c) of the Revenue Act of 1926, as amended, requires the inclusion in the decedent's gross estate of the entire value at the decedent's death of a trust he created in 1930 and modified by an alimony agreement in 1936.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra,* pp. 16–19.

STATEMENT

The pertinent facts, which are all either stipulated or admitted by the pleadings (See R. 37–40), were summarized by the District Court (R. 85–91) and may be restated as follows:

The Trust Company of Georgia, as successor trustee under a deed of trust created on February 14, 1930, by Julian E. Howell (hereinafter referred to as the "decedent") who died on April 19, 1937, filed an estate tax return on November 2, 1939, disclosing the existence of the trust but made no return as to the trust. (R. 89.) On June 9, 1942, the Commissioner made a deficiency

assessment of estate taxes, with interest thereon, in the amount of $107,257.06 based on inclusion of the value of the trust property in decedent's gross estate. Petitioner paid the assessment on July 2, 1942, and subsequently filed a claim for refund thereof. (R. 89–90.) The claim was denied (R. 90) and suit was instituted in the District Court for refund of the $107,257.06. (R. 91).

The relevant facts regarding the trust of February 14, 1930, are as follows:

Decedent was born on August 4, 1908, and, when a minor, inherited a substantial estate from his mother which was managed by his father as guardian until decedent reached his majority in 1929. On February 14, 1930, shortly after decedent became 21, he executed a deed of trust in which his father was named trustee. After the father's death the Trust Company of Georgia, the petitioner here, became trustee. (R. 38, 85–86.) In this trust indenture decedent, the "first party" (R. 18), provided, so far as material here, as follows (R. 19–21):

> Said trustee shall from the net income of said trust estate pay to said first party for and during the period of the life said first party, and at stated intervals not less than quarter-annually, so much thereof as said trustee may determine in his judgment to be necessary for the support and maintenance of said first party any balance of

said net income not necessary for such purpose shall be added to the corpus of said trust estate.

Upon the death of said first party, leaving no wife or lawful children, the net income of said estate shall be paid, not less than quarter-annually, share and share alike to my father, Clark Howell, Sr. (if and while living), Clark Howell, Jr., Comer Howell and Albert Howell, Jr., brothers of said first party, for and during the period of their lives. Upon the death of any one of said brothers, leaving children, the children of such deceased brother shall take that part of the income that would otherwise go to such brother. Upon the death of any of said brothers leaving no children, said income shall be divided among the surviving brothers.

Upon the death of all of the brothers of said first party said estate shall be divided, share and share alike among the nieces and nephews of first party, then in life.

In the event that any beneficiary of said trust estate should be a minor when participating in said estate, then said second party shall act as guardian for such minor or minors, without the requirement of bond or the making of returns to any Court.

* * * * *

Said first party hereby expressly reserves the right to revoke this trust estate upon the arrival of said first party at the age of forty (40) years, in the meantime, should

> first party die before attaining the age of forty (40) years and should leave a wife and lawful issue of his marriage to said wife, then the net income from said trust estate is to be paid by the trustee not less than quarter-annually, share and share alike, to said widow and children for and during the period of their respective lives, and in the event that any of said children shall be minors, when participating in said trust estate, then said trustee shall act as guardian for such minor or minors without the requirement of bond or the making of returns to any Court.
>
> Should said widow, if any, die, then said estate shall be divided, share and share alike, among such of said children as may survive her, the respective shares of said surviving children to be delivered to them upon the respective attainment of their majorities.

On March 20, 1936, after he had married and while he and his wife were separated, decedent entered into an agreement with his wife Dorothy M. Howell, which was assented to by the trustee under the trust. (R. 88.) Under this agreement, which is set forth in the record at pages 62–70, decedent conveyed one-third of the net income of the trust to his wife for so long as the trust is being administered or for such time as she may not remarry, should she and decedent thereafter be divorced. (R. 63–64.) If he and his wife were divorced and his wife remarried, then effec-

tive upon such remarriage, the wife's one-third of the net income was to be paid over to, or applied for the benefit of Julian E. Howell, Jr., their son (R. 64–65), who was born August 3, 1932 (R. 38). The agreement further provided (R. 65–66, 68, 69–70):

> 7. Said Indenture of Trust of February 14, 1930, is hereby enlarged, supplemented and amended to the extent necessary to charge any trustee at any time administering said trust with the duty of paying over or applying one-third (⅓) of the net income accruing from the said estate to, or for the benefit of, the person or persons and for the uses and purposes herein stated.
>
> 8. Indenture of Trust contains a reservation of a right to revoke the trust estate upon the arrival of the said Julian E. Howell, at the age of forty (40) years. Said Julian E. Howell hereby expressly renounces his right to revoke the said trust and agrees to allow the same to remain in full force and effect; provided, however, that he may revoke the same if, contemporaneously with the revocation, there is delivered to the said Dorothy M. Howell, unconditionally and in fee simple, one-third (⅓) of the corpus of the trust estate then being administered if she be then in life and may not then have remarried. In the event of the death of the said Dorothy M. Howell, or of her marriage prior to any

such revocation, then, upon such revocation by said Julian E. Howell, one-third (⅓) of the then corpus of said estate is to become the absolute property of the said Julian E. Howell, Jr.

9. Upon the termination of said trust estate, however, effected, one-third (⅓) of the corpus is to be delivered to the said Dorothy M. Howell, should she be unmarried or (as the case may be) become the property of Julian E. Howell, Jr., as is hereinbefore next provided in respect of a revocation of said trust pursuant to the terms and provisions of said Indenture.

* * * * *

15. The parties hereto are entering into this agreement in order to settle any contest or controversy as to alimony and in the event proceedings are instituted by the said Dorothy M. Howell asking an award of alimony and/or are instituted for divorce by either party, this agreement may be made the judgment of any Court in any such proceeding as to each and every of the matters and things covered thereby.

* * * * *

18. Should Dorothy M. Howell die prior to the death of Julian E. Howell without having remarried, then the one-third (⅓) of the net income accruing from said estate, which would have been paid to her had she remained in life, is to be paid over to, and become the property of the said Julian E. Howell, Jr.

> 19. It is further understood and agreed that all provisions made in this contract concerning Julian E. Howell, Jr., shall terminate upon his reaching the age of twenty-one (21) years.
>
> * * * * *

On April 28, 1936, Dorothy M. Howell was granted a divorce from decedent by a decree entered in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida, and in the decree the provisions of the agreement with reference to alimony were adopted as a part thereof. (R. 89.)

After decedent died on April 19, 1937, about a year after the agreement and divorce, petitioner, the trustee, instituted a proceeding in the Fulton Superior Court seeking a construction of the trust instrument and another trust instrument executed by the decedent, of the wills of decedent and Clark Howell, Sr., of the alimony agreement and the beneficiary in certain insurance policies, and seeking the determination of the rights of the respective beneficiaries named in these instruments and for direction as to certain matters in connection therewith. (R. 70–71.) The state court held the trust of February 14, 1930, valid and with respect to the construction of the trust and the rights of Dorothy Howell, stated (R. 74, 78–79):

> 4. That the only person entitled to any beneficial interest in the property herein

found to be subject to the trust instrument dated February 14, 1930, is the defendant Julian E. Howell, Jr., as he is the only person coming within the class designated, to-wit: lawful issue of the settlor's marriage. * * *

5. That Julian E. Howell, Jr., is entitled to the full equitable title to the property covered by said trust during his minority and to the full legal title thereto upon his arrival at the age of twenty-one years, but said property should be administered by the trustee under said instrument for the maintenance, education and support of said Julian E. Howell, Jr. during his minority.

* * * * *

14. That the rights of the defendant Mrs. Dorothy M. Howell, under the trust instruments and will of Julian E. Howell, deceased, and under the alimony agreement between said defendant and Julian E. Howell, dated March 20, 1936, are as follows:

(a) Said defendant is entitled to receive under the terms of said alimony agreement one-third of the income which accrued upon the property subject to the terms of the trust instrument dated February 14, 1930, prior to the death of Julian E. Howell, and subsequent to April 1, 1936; and Trust Company of Georgia, as successor trustee under said instrument is di-

rected to make full accounting to said defendant in this respect.

* * * * *

Other than as above set forth, this defendant is entitled to no interest in any of the property subject to said trust instruments or said will.

* * * * *

On the basis of these facts the District Court held that Section 302 (c) of the Revenue Act of 1926, as amended, supports the inclusion by the Commissioner of the entire value of the trust property in the decedent's gross estate. (R. 91–99.) This decision was affirmed on appeal. (R. 108–115.)

ARGUMENT

Petitioner does not contest the correctness of the holding of the court below that Section 302 (c) of the Revenue Act of 1926, as amended (Appendix, *infra*, pp. 16–17), now contained in Section 811 (c) of the Internal Revenue Code (26 U. S. C. 811), when considered alone supports the inclusion in the decedent's gross estate of the entire value at the decedent's death of the trust the decedent created in 1930 and later modified by an alimony agreement. Instead, petitioner contends that the decedent's transfer in trust is also taxable under Section 302 (d) of the Revenue Act of 1926, as amended (Appendix, *infra*, pp. 17–18), now contained in Section 811 (d) of the Internal Revenue

Code (26 U. S. C. 811) (Pet. 7; Br. 12, 15), and, on the assumption that that contention is correct, argues that when a transfer is taxable under both sections the transfer should be taxed under Section 302 (d) (Pet. 5–7; Br. 9–12, 16) and that the application of Section 302 (d) in this case would result in an adjustment requiring the inclusion of less than the entire value of the trust in the decedent's gross estate (Br. 12–16). Certiorari is sought on the basis of assertions that there is "existing confusion", and an undecided question of "substantial importance" presented, as to whether a transfer may be taxed under Section 302 (c) when the transfer can be brought within the terms of both Section 302 (c) and (d). (Pet. 7.) These assertions do not, however, afford any ground for review of the case by this Court.

The question raised by petitioner has as its premise an argument that the decedent's transfer is taxable under Section 302 (d), whereas the Collector has not contended that it was and in the court below petitioner, for its own purposes, argued that the transfer is *not* taxable under Section 302 (d).[1] The court below agreed with petitioner's contention that the transfer is *not*

[1] In the court below petitioner argued that the transfer is not taxable under Section 302 (c), because Congress intended to deal exclusively in Section 302 (d) with powers of revocation and to exclude such powers from the application of Section 302 (c), and that the transfer is not taxable at all because it is not taxable under Section 302 (d). (See R. 112, 114–115.)

taxable under Section 302 (d) (R. 115) and its holding in that connection is consistent with the decisions of other courts which state that taxability under Section 302 (d) or its counterpart, Section 811 (d) of the Internal Revenue Code, rests upon an existing power held by the decedent at his death and does not cover contingent powers where, as here, the contingency has not occurred at the decedent's death.[2] Petitioner's present assertions that the transfer is taxable under Section 302 (d) (see Pet .7; Br. 12, 15) are based solely upon petitioner's present interpretation of the statute and of Treasury Regulations 80, Article 20 (Appendix, *infra,* pp. 17–19).[3] It is not contended that there are any conflicting decisions on the point.

If it be assumed, as petitioner asserts, that Section 302 (d) covers contingent powers and that

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[2] See *Jennings* v. *Smith*, 161 F. 2d 74 (C. C. A. 2d); *Commissioner* v. *Flanders*, 111 F. 2d 117, 120 (C. C. A. 2d); *Estate of Ballard* v. *Commissioner*, 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2d); *Helvering* v. *Tetzlaff*, 141 F. 2d 8 (C. C. A. 8th); *Day* v. *Commissioner*, 92 F. 2d 179 (C. C. A. 3d); *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 (C. C. A. 4th); *Estate of Spaulding* v. *Commissioner*, decided March 30, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44, 141); *Estate of Budlong* v. *Commissioner*, 7 T. C. 756, appealed and remanded on other grounds, *sub nom. Industrial Tr. Co.* v. *Commissioner* (C. C. A. 1st), decided December 26, 1947 (1948 P-H, par. 72, 289).

[3] Section 302 (d) (1), as amended (Appendix, *infra*, p. 17), covers transfers "where the enjoyment thereof was subject at the date of his [the decedent's] death to any change through the exercise of a power * * * to alter, amend,

the decedent's transfer in trust is therefore taxable under that section, the case still presents no question not correctly decided below. In the court below, as in this Court (Br. 10–11), the petitioner argued that Congress intended to make Section 302 (d) the exclusive statute covering taxability in the case of a retention of a power to revoke. The court below rejected this argument (R. 114–115), and properly so. Taxability under Section 302 (c) is predicated on the retention by the decedent of a "string" which suspends the disposition of the trust property as between the decedent and the beneficiaries until at or after the decedent's death (*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339); *Helvering* v. *Hallock*, 309 U. S. 106; *Fidelity Co.* v. *Rothensies*, 324 U. S. 108; *Commissioner* v. *Estate of Field*, 324 U. S. 113; *Commissioner* v. *Singer's Estate*, 161 F. 2d 15 (C. C. A. 2d)), whereas under Section 302 (d) it is sufficient if the decedent retains only the power to change the enjoyment of the property as between others (*Commissioner* v. *Estate of Holmes*, 326 U S. 480). When the decedent's power of revocation has, as here, an effect not required for taxability under Section 302 (d)—that is, the

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revoke, or terminate, * * *." Article 20 (b) of Treasury Regulations 80 (Appendix, *infra*, pp. 18–20), states that—

"The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death * * * though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. * * *"

effect of suspending the disposition of the property as between the decedent and the beneficiaries until at or after the decedent's death—the transfer may be taxed under Section 302 (c) even if the transfer is also taxable under Section 302 (d).[4] For the purposes of Section 302 (c), the nature of the "string" held by the decedent is immaterial. "It is enough if he [the decedent] retains *some* contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries" (italics supplied). *Fidelity Co.* v. *Rothensies, supra,* p. 112. As the court below noted (R. 115), in *Reinecke* v. *Northern Trust*

[4] Under the trust instrument involved in the present case the decedent retained the power to revoke the trust when he arrived at the age of forty and under the alimony agreement this power was modified only to the extent that, if he revoked while his wife Dorothy Howell remained alive and unmarried after their divorce, he was required to convey one-third of the trust property to her and, if he revoked after she died or remarried, he was required to convey one-third of the trust property to their son Julian E. Howell, Jr., if he were alive and had not yet reached the age of twenty-one, the son's rights under the alimony agreement terminating when he reached twenty-one. Thus, the decedent retained a contingent right, exercisable when he reached the age of forty, to revoke and take two-thirds of the trust property for himself and also the right to revoke and take the *entire* trust property for himself contingent upon his surviving the age of forty, his wife's death or remarriage, and his son's death or majority. Thus, petitioner's interest suspended the disposition of the entire trust property until his death and for that reason the entire value of the trust property is includible in his gross estate under Section 302 (c).

Co., supra, the language of Section 302 (c) as contained in a predecessor statute was applied by this Court to, and held to support taxability of, two transfers wherein the "string" retained by the decedent consisted of a power to revoke.[5]

CONCLUSION

The decision below is correct and involves no important question or conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1948.

[5] *Reinecke* v. *Northern Trust Co., supra,* also holds that the power to revoke must be held by the decedent alone if it is to furnish a basis for taxability under Section 302 (c), whereas under Section 302 (d) the power may, by the express terms of the statute, be held in conjunction with others and still afford a basis for taxability.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 300. When used in this title—

(a) The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent;

* * * * *

SEC. 302. [As amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169.][1] To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or en-

[1] These amendments represent the deleted part of the text, which cover the retention by the transferor of the possession or enjoyment of, or right to, the trust income for life. Since the instant trust was created about a year prior to March 3, 1931, the amendments are inapplicable. See *Hassett* v. *Welch*, 303 U. S. 303.

joyment at or after his death * * *; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) (1) [As amended by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648.] To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(2) [As added by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death, even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and

for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

* * * * *

Treasury Regulations 80 (1937 ed.):

ART. 20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * *

(b) *Taxability.*—

* * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer," refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or per-

sons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3).)

* * *

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